

No. 48945-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V

CURTIS VINCENT

BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

The evidence is insufficient to convict Curtis Vincent of actual possession of methamphetamine.

Issues Pertaining to Assignments of Error

A bag containing a miniscule quantity of methamphetamine was found in the sweatband of Mr. Vincent's baseball hat. When the trial court instructs on actual possession, but not on constructive possession, and the defendant does not have actual physical custody of the methamphetamine, is the evidence sufficient to convict the defendant of possession of methamphetamine?

B. Statement of Facts

Curtis Vincent was charged by Information with one count of possession of methamphetamine. CP, 1. He proceeded to trial by jury and was convicted. CP, 44. He filed a timely notice of appeal. CP, 74.

Aberdeen Police Officer David Tarrence (hereinafter "Junior")¹ arrested Curtis Vincent on February 14, 2016. RP, 18-20. Incident to arrest, Junior did a routine search of him and placed him in the back of his

¹ In a trial with only five witnesses, two of them are father and son and have the exact same name RP, 23. The designations of "Junior" and "Senior" are used for clarity and not meant to show disrespect

parole vehicle. RP, 19-20. During the search, Junior removed Mr. Vincent's black baseball style hat, ran his hand along the inside of the hat, visually inspected it, and put it back on his head. RP, 18, 30. He did not see or feel anything of evidentiary value when he inspected the hat. RP, 23.

At the jail, Corrections Officer David Tarrance, Senior (hereinafter "Senior") took custody of Mr. Vincent. RP, 26-27. Senior booked Mr. Vincent into the jail, including a routine search. RP, 27. During the search, Senior located a small plastic bag inside of the hat between the brim and the sweatband. RP, 28. Mr. Vincent testified he was shocked when Senior discovered the bag because he had "no recollection it was there." RP, 50. Senior called Junior and turned the bag over to him. RP, 29, 19. Junior booked the bag into evidence. RP, 19.

The next day, Detective Jason Perkinson contacted Mr. Vincent in the jail. RP, 72. Mr. Vincent admitted he is a daily, or near daily, methamphetamine user. RP, 75, 51. He said the baseball hat was his and he had been wearing it at the time of his arrest. RP, 74. He said he had sometimes kept methamphetamine in his hat in the past, but he did not think there was any there anymore. RP, 75, 51-52.

The contents of the bag were later weighed and tested. The bag was found to contain .01 grams of methamphetamine. RP, 41-42.

Near the conclusion of the case, the court and parties held a jury instruction conference. The prosecutor represented he was proceeding only a theory of actual possession, saying, "I think both parties agree that there is no issue of constructive possession in this case, that we're only talking about actual possession. And the comments to that -- that particular WPIC indicate that if you -- if you don't have an issue with constructive possession, then there is really, -- there's no need to have all those paragraphs to proximity and things of that nature. And so I believe both parties agree that only the first sentence should be used in the instruction." RP, 66-67. Defense counsel agreed with this recitation. RP, 67. The jury was instructed on possession as follows: "Possession means having a substance in one's custody and control." RP, 83.

C. Argument

Mr. Vincent challenges the sufficiency of the evidence to convict him of possession of methamphetamine. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

To be convicted of drug possession, the facts and circumstances must suggest either actual or constructive possession. *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969). This case is unique because the jury was instructed on actual possession only. When the State proposes instructions, later adopted by the court, that limit its theory of the case, the jury instructions become the law of the case. *State v. Kirwin*, 166 Wn App. 659, 271 P.3d 310 (2012); *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998). When the State presents insufficient evidence of the charge, as defined in the jury instructions, the remedy is dismissal with prejudice. *Kirwin* at 670.

A defendant has actual possession when he or she has physical custody of the item and constructive possession if he or she has dominion and control over the item. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Constructive possession occurs when the person has dominion and control over the item enabling that person to immediately convert the item to actual possession. Dominion and control means that the object may be reduced to actual possession immediately. *Jones* at 333. Mere proximity to the drugs is insufficient. *State v. Callahan*.

The Supreme Court reviewed a case superficially similar to Mr. Vincent's in *State v. Staley*. *State v. Staley*, 123 Wn.2d 794, 872 P.2d 502 (1994). In *Staley*, the defendant, a professional musician, discovered a

small amount of cocaine in his tip jar at the end of his shift. Surprised to find it, he pocketed it and intended to throw it away at the earliest opportunity, but forgot. The cocaine was discovered when he was arrested for DUI.

Staley requested a jury instruction which stated that “fleeing, momentary, temporary or unwitting” possession of cocaine is not unlawful. The Supreme Court held that the instruction conflated the issues of possession, which must be proved by the State beyond a reasonable doubt, and unwitting possession, which must be proved by the defense by a preponderance of the evidence. The Court then engaged in a lengthy discussion on the principle of possession under Washington law.

The terms “momentary, temporary and fleeting” are not related to the defense of “unwitting” possession but go rather to the element of possession. To understand the import of those terms to the issue of possession it is useful to review the facts before the court in *Callahan*. The police, executing a premises warrant, discovered drugs in several locations on a houseboat. The issue on appeal was whether sufficient evidence existed on which the jury could find the defendant possessed the drugs. The defendant, Callahan, was merely a visitor to the houseboat but admitted to police that earlier on the day of the search he had handled the drugs later found in the houseboat.

The court considered first whether the evidence supported a finding of actual possession. Since the defendant was not found with the drugs on his person the court stated that the only basis on which the jury could find that the defendant had actual possession would be the fact that he had handled the drugs earlier and such actions are not sufficient for a charge of possession since

possession entails actual control, not a passing control which is only a momentary handling.

The court then turned to the issue of constructive possession and determined that proof of mere proximity to the drugs and an earlier momentary handling did not establish dominion and control over the drugs; thus, the evidence was insufficient to “make the issue of constructive possession a question for the jury.” Significant to this determination was testimony that the drugs were owned by another who had sole control over them. The court said that “[c]onsideration must be given to the ownership of the drugs as ownership can carry with it the right of dominion and control.”

State v. Staley, 123 Wn.2d 794, 800-801, 872 P.2d 502 (1994), citing *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969).

In Mr. Vincent’s case, taking the facts in the light most favorable to the State, there is little doubt that a reasonable jury could have found constructive possession. He had a miniscule amount of methamphetamine (.01 gram) in a bag in the sweatband of his baseball hat. The methamphetamine in the bag was readily available to reduce to actual possession.

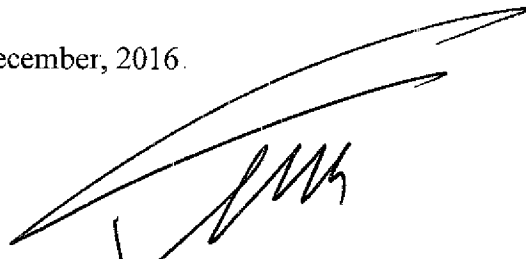
But what is important here is that the State proceeded only on a theory of actual possession and Mr. Vincent did not have actual possession. He did not have physical custody. The hat had physical custody. Mr. Vincent may have been close to the bag with methamphetamine, but because mere proximity is insufficient, he did not have actual possession. Mr. Vincent admitted being a near daily user of

methamphetamine who had stored methamphetamine in his hat in the past, but was shocked to learn the bag was still there. Given the extremely small quantity, it is likely the bag was left over from a previous occasion. Like the defendant in Callahan, who admitted handling the drugs earlier in the day, evidence Mr. Vincent may have used his hat to store methamphetamine on an earlier occasion is insufficient to find actual possession. While Mr. Vincent could certainly have reduced the contents of the bag to actual possession and been convicted under a constructive possession theory, there is no evidence he actually possessed the contents of the bag. Under the law of the case, the State failed to prove possession under the only theory for which the jury received instructions. The remedy is dismissal with prejudice. *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed 2d 1 (1978)

D. Conclusion

This Court should reverse and dismiss for insufficient evidence.

DATED this 9th day of December, 2016.

A handwritten signature in black ink, appearing to read 'T. Weaver', is written over a horizontal line.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

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December 09, 2016 - 4:35 PM

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8 DIVISION II

9 STATE OF WASHINGTON,) Court of Appeals No.: 48945-7-II
10)
11 Plaintiff/Respondent,) DECLARATION OF SERVICE OF
12) BRIEF OF APPELLANT
13)
14 vs)
15)
16 CURTIS VINCENT,)
17)
18 Defendant/Appellant.)

14 STATE OF WASHINGTON)
15)
16 COUNTY OF KIISAP)

16 I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

17 On December 9, 2016, I e-filed the Brief of Appellant in the above-captioned case with the
18 Washington State Court of Appeals, Division Two; and designated a copy of said document to
19 be sent to Katherine Lee Svoboda of the Grays Harbor County Prosecuting Attorney's Office
via email to: ksvoboda@co.grays-harbor.wa.us through the Court of Appeals transmittal system

20 On December 9, 2016, I deposited into the U S Mail, first class, postage prepaid, a true and
21 correct copy of the Brief of Appellant to the defendant:

22 Curtis Vincent
23 16 Malone Hill Branch Road
24 Elma, WA 98541

24 ///

25 ///

1 I declare under penalty of perjury under the laws of the State of Washington that the foregoing is
2 true and correct

3
4 DATED: December 9, 2016, at Bremerton, Washington.

5 
6 Alisha Freeman

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